

Minutes
D.C. OFFICE OF EMPLOYEE APPEALS (OEA) BOARD MEETING
Thursday, June 17, 2021
Location: Virtual Meeting Via Webex

Persons Present: Lasheka Brown (OEA General Counsel), Sheila Barfield (OEA Executive Director), Sommer Murphy (OEA Deputy General Counsel), Clarence Labor, Jr. (OEA Board Chair), Patricia Hobson Wilson (OEA Board Member), Jelani Freeman (OEA Board Member), Peter Rosenstein (OEA Board Member), Wynter Clarke (OEA Paralegal), Roxanne Cromwell (Member of the Public), and Abraham Davis (Member of the Public).

- I. Call to Order** – Clarence Labor, Jr. called the meeting to order at 11:03 a.m.
- II. Ascertainment of Quorum** – There was a quorum of Board members present for the office to conduct business.
- III. Adoption of Agenda** – Peter Rosenstein moved to adopt the Agenda. Jelani Freeman seconded the motion. The Agenda was adopted by the Board.
- IV. Minutes from Previous Meeting** – The April 22, 2021 meeting minutes were reviewed. There were no corrections. The minutes were accepted.
- V. New Business**

A. Public Comments on Petitions for Review

- 1. There were written public comments provided to the Board during the meeting for Employee v. Department of Small and Local Business Development, OEA Matter No. J-0009-18R20.

B. Summary of Cases

- 1. **Employee v. Department of Small and Local Business Development, OEA Matter No. J-0009-18R20** – This matter has been previously before the Office of Employee Appeals' Board. Employee worked as an Administrative Officer with the Department of Small and Local Business Development. On September 11, 2017, Employee received a notice that she would be terminated by Agency effective October 9, 2017.

On January 29, 2018, the Administrative Judge ("AJ") issued her Initial Decision. She held that Employee's appointment was through open enrollment in a different line of work; thus, she was required to serve a second probationary period. Therefore, her appeal was dismissed. Employee filed a Petition for Review of the Initial Decision. In her petition, Employee submitted a document titled "Checklist for Submissions of Competitive & Non-Competitive Recruitment Actions to DCHR/Priority Consideration Clearance for Non-Competitive Term Appointments." The OEA Board held that because the Administrative Officer position was listed as a non-competitive appointment, Employee's appointment may not have been the result of open competition. Thus, the Board ruled that there was not substantial evidence in the record to support the AJ's ruling regarding open competition. Therefore, it remanded the matter to the Administrative Judge for consideration of the case on its merits.

The AJ issued an Initial Decision on Remand on May 29, 2020. She held that Agency did not have cause to terminate Employee, and it did not consider relevant factors

before removing Employee. As a result, she ordered that Agency's action be reversed and that it reinstate Employee and provide back pay and benefits lost as the result of her removal. On September 21, 2020, Employee filed a Petition for Enforcement. She provided that Agency's General Counsel informed her that she would not be reinstated because she was a term employee, and her term expired. Subsequently, the AJ held a status conference to determine Agency's compliance with the Initial Decision on Remand.

The Administrative Judge issued an Addendum Decision on Compliance on February 17, 2021. She explained that Employee contended that even though her employment with Agency was a term appointment, upon the expiration of the term, she should have reverted to her previous permanent appointment status, which she acquired at the District of Columbia Human Resources. The AJ opined that the final order issued by OEA was to reinstate Employee to her previous position of record within the Department of Small and Local Business. She found that Employee forfeited her Career Service, permanent appointment at DCHR for a term appointment position with Agency. Consequently, the AJ held that because Agency decided not to extend Employee's term appointment past the designated end date, it was not required to reinstate Employee. Accordingly, she ordered that Agency reimburse Employee back pay and benefits from the time she was wrongfully terminated until the expiration date of her term appointment date.

In response to the Addendum Decision on Compliance, Agency submitted a Statement Regarding Compliance on March 22, 2021. It acknowledged that it had not reimbursed Employee's back pay and benefits, although it had made every effort to do so. Agency argued that pursuant to DPM § 1149.12, it was required to deduct any amount earned by employee from other employment during the period covered by the corrected personnel action from the back pay and benefits award. As a result, it requested an affidavit of outside earnings and erroneous payment; a benefits restoration agreement; and a transcript of tax returns from Employee. However, Agency argued that Employee failed to provide the required documentation. Accordingly, it requested that it be excused from the thirty-day compliance deadline imposed in the Addendum Decision on Compliance.

On March 23, 2021, Employee filed a Petition for Review. She argues that she previously worked at DCHR as a Career permanent employee. Subsequently, she accepted a new position with Agency with an increased salary, at a different work site, and as a term employee. However, Employee asserts that when her term appointment expired, she was entitled to revert to her previous Career permanent status. It is Employee's position that a promotion from one District government agency to another was considered an internal placement and triggered her Career permanent protections. As a result, she requests that this Board reverse the Addendum Decision on Compliance and order that she be reinstated to a Career permanent position.

Agency filed an Opposition to Employee's Petition for Review on April 27, 2021. It argues that the OEA Board lacks jurisdiction to review Employee's petition. Agency contends that the Board can review initial decisions but not decisions on compliance. Moreover, Agency explains that Employee resigned from her position with DCHR and accepted a new position with Agency under a term appointment. It opines that in accordance with DPM sections 823 and 826, an employee hired under a term appointment cannot be converted to a permanent appointment if the initial appointment

was made non-competitively. Agency reasons that given the previous decisions issued in this case, it is undisputed that Employee was hired non-competitively, under a term appointment. Therefore, it is required to reimburse Employee back pay and benefits through the expiration of her term appointment date. Accordingly, it requests that this Board deny Employee's petition. Subsequent opposition motions were filed by both parties.

2. **Employee v. Department of Forensic Sciences, OEA Matter No. 1601-0015-21** – Employee worked as a Crime Scene Forensic Scientist with the Department of Forensic Sciences. On January 26, 2021, Agency issued a Notice of Final Decision informing Employee that he would be removed from his position. He was charged with inability to carry out assigned duties and discriminatory practices, in violation of 6B District of Columbia Municipal Regulations ("DCMR") §§ 1607.2(n) and 1607.2(j)(3). Consequently, he was terminated from employment effective January 30, 2021.

Employee filed a Petition for Appeal with the Office of Employee Appeals on February 23, 2021. He asserted that Agency lacked substantial evidence for the charges imposed. Additionally, Employee argued that Agency failed to consider the factors provided in *Douglas v. Veterans Administration*. Therefore, he requested that he be reinstated and receive back pay.

On April 8, 2021, Agency filed an Answer to Employee's Petition for Appeal. Agency contended that the charges against Employee were based on a social media post and statements made during a subsequent disciplinary interview, where he expressed his belief that non-white, non-male individuals are inefficiently held accountable by the criminal justice system. It was Agency's position that it could not entrust Employee as a witness in its cases after he expressed such beliefs and bias. It asserted that its removal action complied with the law and that it considered all twelve *Douglas* factors before imposing a penalty. Accordingly, it requested that Employee's Petition for Appeal be denied.

On May 13, 2021, the OEA Administrative Judge issued an Order of Show Cause to Agency. In the order, he explained that OEA sent Agency a letter, dated March 9, 2021, informing it of Employee's appeal. The letter provided that pursuant to OEA Rule 607.2, Agency was required to file an Answer within thirty (30) calendar days of service of the Petition for Appeal. Thus, Agency's answer was due on or before April 8, 2021. Therefore, the AJ ordered Agency to submit a statement of good cause for failing to submit a timely Answer to Employee's Petition for Appeal.

After receiving no response to the Show Cause order, the AJ issued his Initial Decision on May 27, 2021. The AJ ruled that Agency's failure to submit an Answer to Employee's Petition for Appeal or respond to the Order to Show Cause constituted a failure to defend its decision of separating Employee from service. Consequently, he reversed Agency's termination action and ordered that it reinstate Employee with back pay and benefits lost as a result of his removal.

On June 4, 2021, Agency filed a Petition for Review. It asserts that it timely filed its Answer to the Petition for Appeal and Designation of Agency Representative form via email to OEA's Office Manager, Gabrielle Smith-Barrow. It further submits that Ms. Smith-Barrow immediately confirmed receipt of the documents via email. Therefore,

it is Agency's position that the Show Cause Order and Initial Decision were issued in error, and the matter should be remanded to the AJ to decide the case on the merits.

3. **Employee v. Office of the Chief Technology Officer, OEA Matter No. 1601-0046-97R09R16**—This matter was previously before the Board. After several appeals and remands, the District of Columbia Court of Appeals ordered OEA to re-adjudicate Employee's back pay claim. As it related to the back pay issue, the Court noted that Agency had the burden of proof as to whether Employee reasonably attempted to mitigate his damages. Additionally, the Court instructed OEA to make a period-by-period determination regarding Employee's efforts to mitigate his damages.

In his Second Initial Decision on Remand, the AJ held that Employee adequately mitigated his damages from 1997 through 2002 by submitting several applications each week and posting his resume on various job search websites. He noted that Employee worked in Pre-paid Legal Services and started several unsuccessful businesses during this time. Concerning his search efforts from 2003 through 2009, the AJ concluded that Employee continued to post his resume on websites; but only submitted approximately seventy-five electronic applications and twenty-five paper applications over the course of six years. Based on the testimony elicited during the evidentiary hearing, the AJ held that Employee only attempted to mitigate his damages from 1997 through 2002. He opined that Employee failed to prove that he exercised reasonable diligence in attempting to find alternative employment in his field from January 1, 2003 until Agency reinstated him on November 1, 2009.

As it related to Employee's potential entitlement to additional back pay from 2003 to 2009, the AJ explained that while Agency met its burden of proof in establishing that Employee failed to mitigate his damages during the aforementioned period, it failed to present any evidence as to what salary Employee could have earned had he attempted to find equivalent employment. However, he noted that Employee's own witness testified that Employee could have earned \$50,000 per year as an IT professional. Thus, based on the D.C. Court of Appeal's holding in *Wisconsin Ave. Nursing Home v. D.C. Commission on Human Rights*, the AJ believed that Employee's witness, Anthony Bird, provided testimony that was adequate to establish what salary Employee could have earned from 2003 through 2009 if he attempted to find suitable work. Accordingly, the AJ ordered that Employee be reimbursed all back pay and benefits lost as a result of his termination starting from the date of his removal through December 31, 2002, less any amounts paid and actual interim earnings. Agency was further ordered to reimburse Employee for back pay and benefits from January 1, 2003 to November 2, 2009, less an annual prorated amount of \$50,000 for the months Employee was unemployed. Lastly, the AJ instructed Agency to pay Employee \$139,603.49 for his annual leave hours, as previously agreed upon.

On April 1, 2021, Agency filed a Petition for Review of the AJ's Second Initial Decision on Remand. It argues that the AJ's ruling on back pay from November 1, 1997 to December 31, 2002 was not based on substantial evidence. According to Agency, the testimonial evidence supports a finding that Employee failed to exercise reasonable diligence in seeking employment. It believes that Employee's testimony was not credible in establishing his mitigation efforts. Additionally, Agency reasons that Employee is not entitled to back pay from February 4, 2005 through November 1, 2009 because beginning on February 4, 2005, Chapter 6B, Section 1149 of the D.C.

Municipal Regulations limited back pay when there is a finding that an employee failed to mitigate his damages.

Employee filed a Cross-Petition for Review on April 5, 2021. It contends that the AJ made an error of law in deducting \$50,000 per year from his award of damages because the position he used to reach his conclusion was inferior to the one Employee previously held. He further opines that the AJ's determination that he failed to exercise reasonable diligence in his job search efforts to obtain employment from January 1, 2003 to November 1, 2009 was contrary to law and not supported by substantial evidence. Moreover, Employee claims that OEA should affirm the portion of the Second Initial Decision on Remand regarding the AJ's finding that he is entitled to full back pay from November 1, 1997 to December 31, 2002. He also requests that the Board reverse the portion of the AJ's decision concluding that there must be a \$50,000 per-year reduction in back pay from 2003 through 2009 because that is the salary Employee could have earned had he exercised diligence in securing employment.

On April 29, 2021, Employee filed a Response to Agency's Petition for Review. He states that he is entitled to a reversal of the AJ's decision that he failed to mitigate damages from 2003 to 2009. Employee explains that he continued to seek outside employment during this time and created self-employment opportunities by establishing four businesses. Additionally, he argues and that it was a legal error to impute projected income to an employee from an inferior position that he was neither required to search for nor accept. Moreover, Employee believes that the AJ's finding regarding the award of back pay from November 1, 1997 to December 31, 2002 is supported by the record because the AJ was the appropriate person to make the pertinent witness credibility findings. He also disagrees with Agency's contention that DCMR § 1149.11 changed the common law mitigation rule in a manner more favorable for the District and reasons that this argument is being raised for the first time before the OEA Board, after nearly twenty-four years of litigation. Therefore, Employee asks that his petition be granted.

Agency submitted an Opposition to Employee's Cross-Petition for Review on May 6, 2021. It reiterates its previous argument that the AJ's finding is supported by substantial evidence. It also believes that Employee's argument that the AJ committed an error by imputing \$50,000 per year to his income in calculating back pay lacks merit. Consequently, it requests that Employee's Cross-Petition for Review be denied.

C. Deliberations – After the summaries were provided, Patricia Hobson Wilson moved that the meeting be closed for deliberations. Jelani Freeman seconded the motion. All Board members voted in favor of closing the meeting. Clarence Labor, Jr. stated that, in accordance with D.C. Code § 2-575(b)(13), the meeting was closed for deliberations.

D. Open Portion of Meeting Resumed

E. Final Votes – Clarence Labor, Jr. provided that the Board considered all of the matters. The following represents the final votes for each case:

1. Employee v. Department of Small and Local Business Development, OEA Matter No. J-0009-18R20

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
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Clarence Labor, Jr.		X		
Patricia Hobson Wilson		X		
Jelani Freeman		X		
Peter Rosenstein		X		
Dionna Lewis				

Four Board Members voted in favor of denying Employee's Petition for Review. Therefore, the petition was denied.

2. Employee v. Department of Forensic Sciences, OEA Matter No. 1601-0015-21

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor, Jr.	X		X	
Patricia Hobson Wilson	X		X	
Jelani Freeman	X		X	
Peter Rosenstein	X		X	
Dionna Lewis				

Four Board Members voted in favor of granting Agency's Petition for Review and remanding the matter. Therefore, the petition was granted and the matter was remanded to the Administrative Judge for consideration on its merits.

3. Employee v. Office of the Chief Technology Officer, OEA Matter No. 1601-0046-97R09R16

MEMBER	GRANTED	DENIED	REMANDED	DISMISSED
Clarence Labor, Jr.			X	
Patricia Hobson Wilson			X	
Jelani Freeman			X	
Peter Rosenstein			X	
Dionna Lewis				

Four Board Members voted in favor of remanding the matter to the Administrative Judge for proceedings consistent with this Order.

F. Public Comments – There were no public comments offered.

- VI. Adjournment** – Peter Rosenstein moved that the meeting be adjourned; Patricia Hobson Wilson seconded the motion. All members voted affirmatively to adjourn the meeting. Clarence Labor, Jr. adjourned the meeting at 12:03 p.m.

Respectfully Submitted,
Wynter Clarke
Paralegal Specialist